

NEW YORK STATE  
DEPARTMENT OF ECONOMIC DEVELOPMENT  
633 THIRD AVENUE  
NEW YORK, NY 10017

In the Matter

- of -

the Application of **RocSpaces, Inc.**  
for Certification as a Women-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61398

RECOMMENDED ORDER

- by -

A handwritten signature in blue ink, appearing to read "Richard A. Sherman", is written over a horizontal line.

Richard A. Sherman  
Administrative Law Judge

October 18, 2017

## **SUMMARY**

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny RocSpaces, Inc. ("RocSpaces" or "applicant") certification as a women-owned business enterprise ("WBE")<sup>1</sup> be affirmed for the reasons set forth below.

## **PROCEEDINGS**

This matter involves the appeal by applicant, pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, challenging the determination of the Division that RocSpaces does not meet the eligibility criteria for certification as a WBE.

The Division denied the WBE application (exhibit 1) filed by RocSpaces for WBE certification by letter dated February 17, 2017 (exhibit 2). The letter sets forth two grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal ("notice of appeal"), dated February 27, 2017. The Division advised applicant that the hearing on this matter would be held on September 5, 2017 (letter from the Division to applicant, dated June 19, 2017).

I convened the hearing at approximately 1:30 p.m. on September 5, 2017, at the Division's offices, 633 Third Avenue, New York, New York. Paula Lehmann appeared on behalf of RocSpaces. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, Matthew LeFebvre, a senior certification analyst for the Division. A list of the exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording on compact disc ("CD") was provided to this office on September 6, 2017, whereupon, the hearing record closed.

## **ELIGIBILITY CRITERIA**

The eligibility criteria pertaining to certification as a WBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions or interviews that are conducted by Division analysts.

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<sup>1</sup>The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR 140.1[tt] [defining a women-owned business enterprise as one that is, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

## STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of WBE certification for RocSpaces is not supported by substantial evidence (see State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

## POSITIONS OF THE PARTIES

### Position of the Division

The Division cites two bases for the denial of RocSpaces' WBE application. First, the Division argues that applicant failed to establish that the woman owner, Paula Lehmann, makes decisions pertaining to the operations of the business enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(b)(1)]). Second, the Division argues that applicant failed to establish that Paula Lehmann has adequate managerial experience or technical competence to operate the business enterprise (exhibit 2 at 2 [citing 5 NYCRR 144.2(b)(1)(i)]).

### Position of Applicant

Applicant's owner, Paula Lehmann, states that she "do[es] not believe [that her] resume adequately portrays [her] knowledge and experience in the construction field" (notice of appeal at 1). Ms. Lehmann further states that she was raised in a "construction family" and has been on job sites for 30 years (id.). Applicant requested a hearing to elaborate on these and other reasons in support of granting RocSpaces' WBE application (id. at 2).

## FINDINGS OF FACT

1. RocSpaces is a newly formed corporation, established July 18, 2016, and is in the business of providing cabinetry, millwork, trim, doors and windows (exhibit 1 at 2 [items 1.Q-R]; exhibit 1 at 3 [items 3.A-D]; CD at 5:15 [LeFebvre testimony regarding business activities of applicant]; CD 16:45 [Lehmann testimony regarding business activities of applicant]).

2. Paula Lehmann is the President and majority owner of RocSpaces (exhibit 1 at 2-3 [items 1.P, 2.A]; CD 5:05 [LeFebvre testimony regarding Ms. Lehmann's ownership of RocSpaces]).

3. Prior to becoming the owner of RocSpaces in 2016, Paula Lehmann was employed as Director of Operations for senior living communities, Director of Human Resources for a payroll company, and an Accounts Payable Specialist for a construction company (exhibit 3 at 1; CD at 9:00 [LeFebvre testimony regarding Ms. Lehmann's work experience]).

4. John Lehmann, Paula Lehmann's husband, is the Vice President of RocSpaces and owns 44 percent of the business (exhibit 1 at 2-3 [item 2.A]; exhibit 1 at 6 [item 6.H]; CD 5:05 [LeFebvre testimony regarding John Lehmann's ownership of RocSpaces]).

5. John Lehmann has been the President of Lehmann Construction since 1991 (exhibit 3 at 2; CD at 8:05 [LeFebvre testimony regarding John Lehmann's work experience]). From 1978 through 1991 he was employed as a construction project manager, field construction superintendent, and carpenter (id.).

6. Michael Lehmann, Paula Lehmann's son, is an estimator for RocSpaces and owns five percent of the business (exhibit 1 at 2-3 [item 2.A]; exhibit 1 at 4 [items 2, 3, 8-10]; CD 5:05 [LeFebvre testimony regarding Michael Lehmann's ownership of RocSpaces]).

7. Michael Lehmann has work and educational experience in construction, engineering, and construction related software (exhibit 3 at 3; CD at 8:35 [LeFebvre testimony regarding Michael Lehmann's work experience]). Since 2008 he was employed as an estimator, and construction project manager (id.).

## DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of RocSpaces as a WBE pursuant to Executive Law Article 15-A. The Division cites two bases in support of upholding the denial, both of which are discussed below.

### Operation: Decisions Pertaining to Operations

The eligibility criterion at issue provides that "[d]ecisions pertaining to the operations of the business enterprise must be made by . . . women claiming ownership of that business enterprise" (5 NYCRR 144.2[b][1]).

The Division argues that applicant failed to demonstrate that Paula Lehmann makes decisions pertaining to the enterprise's significant functions, particularly decisions related to estimating and supervising field operations (exhibit 2 at 2; CD at 6:30-7:30).

Applicant concedes that Michael Lehmann is an expert estimator, but asserts that Paula Lehmann selects the jobs to be bid and sets the scope of work (notice of appeal at 2). Paula Lehmann also testified that she is "in field as much as [she] can be, but . . . there's work that needs to be done in the office too" (CD at 17:00).

The application materials support the Division's determination that applicant failed to establish that Paula Lehmann is responsible for decision making relating to RocSpaces' significant business functions. The Division identified estimating and field supervision as applicant's significant business functions. The application states that Michael Lehmann alone is responsible for estimating and preparing bids, and that he and Paula Lehmann share responsibility for supervising field operations (exhibit 1 at 3-4 [items 4.A.2, 3, 8]). Further, as

discussed in more detail under the section below on managerial experience and technical competence, John and Michael Lehmann's resumes indicate that they have work and educational backgrounds that are commensurate with operating a construction business, while Paula Lehmann's resume does not (see exhibit 3; see also CD at 9:25 [LeFebvre testimony that Paula Lehmann's experience does not match that of John and Michael Lehmann]).

I note that the application states that Paula Lehmann is responsible for marketing, hiring and firing, and negotiating contracts (exhibit 1 at 3-4 [items 4.A.6, 7, 11]). While these functions are important to applicant's success, I do not consider the Division's focus on estimating and field supervision as RocSpaces' "significant functions" to be unreasonable given that applicant is in the construction business. Successful bidding on construction projects, and the proper execution of those projects, are essential to the operation of applicant's business.

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that decisions pertaining to the operations of RocSpaces are not made by Paula Lehmann as required by 5 NYCRR 144.2(b)(1).

#### Operation: Managerial Experience or Technical Competence

The eligibility criterion at issue requires that the applicant demonstrate that the women owners "have adequate managerial experience or technical competence in the business enterprise seeking certification" (5 NYCRR 144.2[b][1][i]).

The Division states that its determination to deny the WBE application on this criterion is supported by the fact that applicant did not demonstrate that Paula Lehmann has any training or technical competence in the carpentry industry, or relevant managerial experience relating to estimating or supervising field operations (exhibit 2 at 2). The Division further states that John and Michael Lehmann have relevant experience in both estimating and managing projects (id.).

Applicant argues that Paula Lehmann's resume, which applicant submitted as part of its WBE application, does not "adequately portray[] [Ms. Lehmann's] knowledge and experience in the construction field" (notice of appeal at 1). Applicant asserts that Ms. Lehmann has worked for various subsidiaries of a prominent developer in the Rochester area since 1998 and that she has experience in construction "contracts, purchasing construction material, on site supervision, managing a workforce with 700 employees, attending weekly construction meetings and maintaining a construction schedule" (id.). Applicant concedes that Michael Lehmann is an expert estimator, but asserts that Paula Lehmann selects the jobs to be bid and sets the scope of work (id. at 2).

The resumes that RocSpaces submitted with its WBE application demonstrate that John and Michael Lehmann have significant construction-related work experience and educational backgrounds (see exhibit 3 at 2, 3 [stating that John and Michael Lehmann each hold a bachelor of science degree in mechanical engineering, that John Lehmann has worked in the carpentry industry since 1978, and that Michael Lehmann has worked in the construction industry since 2008]). In contrast, Paula Lehmann's resume indicates that her management experience is derived from working at senior living communities and a payroll company (see exhibit 3 at 1; see

also CD at 9:25 [LeFebvre testimony that Paula Lehman's experience does not match that of John and Michael Lehmann]).

Paula Lehmann testified at the hearing that she grew up in a construction family and that she learned the construction business through that experience (CD at 12:45). Although Ms. Lehmann's testimony was credible, nothing in the application materials that were before the Division indicated that Ms. Lehmann had a family history in the construction field. Only one of the employers listed on her resume is a construction company, and her position there was as an accounts payable specialist from 1998 to 2000 (exhibit 3 at 1). Ms. Lehmann explained that the other companies listed on her resume are subsidiaries of her parent's construction company, but that is not stated anywhere in the application materials. Moreover, her job titles and responsibilities do not demonstrate significant managerial experience or technical competence related to the construction industry (see id. [stating that, from 2000 to 2016, Ms. Lehmann was Director of Operations for senior living communities, and that for much of the same period, from 2000 to 2012 she was also Director of Human Resources for a payroll company]).

In response to the Division's representations concerning John Lehmann's background in the construction industry, Paula Lehmann asserted that Mr. Lehmann is not "actively involved" in RocSpaces' business activities (CD at 35:10). John Lehmann is, however, identified on the WBE application as RocSpaces' Vice President, and as a 44 percent owner of the business (exhibit 1 at 2-3 [item 2.A]). Given this, it was not unreasonable for the Division to consider John Lehmann's background in its evaluation of RocSpaces' WBE application.

Applicant also proffered a letter from a client in support of RocSpaces' WBE application (see exhibit 5). The letter states that the client supports RocSpaces' application, but does not set forth any facts that demonstrate that Paula Lehmann has managerial experience or technical competence in the business enterprise seeking certification (id.). Other documents that applicant submitted at hearing (see exhibits 4, 6, 7) post-date the Division's determination to deny the application and, therefore, were not considered by the Division.

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that Paula Lehmann does not have adequate managerial experience or technical competence in the business enterprise seeking certification as required by 5 NYCRR 144.2(b)(1)(i).

## CONCLUSION

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny RocSpaces' WBE application on the bases of whether the woman owner, Paula Lehmann, (i) makes decisions pertaining to the operations of the business enterprise (see 5 NYCRR 144.2[b][1]); and (ii) has adequate managerial experience or technical competence to operate the business enterprise (see 5 NYCRR 144.2[b][1][i]).

## RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny RocSpaces, Inc., certification as a women-owned business enterprise should be affirmed.

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### Matter of RocSpaces DED File ID No. 61398

#### Exhibit List

<b>Exh. #</b>	<b>Description</b>
1	RocSpaces WBE Application, submitted January 11, 2017
2	Department WBE Denial Letter to RocSpaces, dated February 17, 2017
3	Resumes of RocSpaces personnel
4	RocSpaces payment application, dated March 30, 2017
5	Letter from Capstone, dated November 16, 2016, in support of RocSpaces WBE application
6	Letter from Capstone, dated August 31, 2017, in support of RocSpaces WBE application
7	Contract for RocSpaces services, dated July 27, 2017